Supreme Court, U. S.
FILED
FEB 7, 1980
MICHAEL RODAK, JR., CLERK

No. 79-1043

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE CITY OF BLACK JACK,
A Municipal Corporation, *et al.*,

Petitioners,

v.

BARBARA BATES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

WILLIAM H. ALLEN
ALEX KOZINSKI
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

ROY W. BERGMANN
120 South Central
Clayton, Missouri 63105

SHELDON K. STOCK
130 South Bemiston
Clayton, Missouri 63105
Attorneys for Petitioners

February 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1043

THE CITY OF BLACK JACK,
A Municipal Corporation, *et al.*,

Petitioners,

v.

BARBARA BATES, *et al.*,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

Respondents' principal contention is that the petition is premature. In advancing the contention, they are deceptively bland in their description of the court of appeals' judgment. Thus, in their statement of the question presented, they say that the court of appeals "has directed the District Court to supervise settlement negotiations and, if necessary, to enter injunctive relief aimed at redressing the loss of housing opportunities occasioned by the City's illegal and discriminatory conduct" and that the question

presented "is whether . . . any form of equitable redress levied against [petitioners] would be inappropriate." (Br. in Opp. 1.)

The fact is that "equitable redress" has been "levied" against Black Jack already. It was a form of equitable redress that is traditional where a statute or ordinance has been found repugnant to federal law. Black Jack has been ordered not to enforce its zoning ordinance and, beyond that, has been specifically ordered to take necessary steps to permit construction of the Park View Heights project. (Pet. App. B8-B9.) What respondents sought below, and what the court of appeals granted, is something far more than this traditional equitable redress. It is an order to take affirmative action to provide housing units to substitute for the units that the developers no longer find it worth their while to construct. That is the gist of the court of appeals' guidelines, and in this respect they are not "unexceptional," as respondents would have it (Br. in Opp. 1), but unprecedented, as we have explained in the petition.

We pointed out in the petition (pp. 12-13) that, under the court of appeals' judgment, the proceedings on remand will necessarily entail a sacrifice of the City's sovereignty. The court below "suggested" that the City meet with the respondents, the district judge and perhaps representatives of the United States government to work out the means of providing 108 units of housing in the city; these are not mere "settlement negotiations," as the respondents characterize them. Alternatively, if these joint conferences should not prove fruitful, the district court is

commanded to enter a decree appropriate to achieve that goal. However, if petitioners' contentions are sound, neither of these alternatives is permissible. Any decree entered against the City—whether it be the fruit of judicially compelled conferences or by court order—will impair the City's autonomy and deprive it of the power to determine its land-use policies according to its normal political process. Under the court of appeals' judgment this sacrifice of sovereignty cannot be avoided on remand.

The important question presented therefore cannot be deferred on the ground of its prematurity. Only review by this Court now can avoid the consequences we have mentioned.

Only a few other points in the brief in opposition merit reply.

1. Respondents quite understandably try to paint Black Jack and its officials as villains who acted deliberately to discriminate against them. (Br. in Opp. 2-5.) Their quotations from opinions of the court of appeals should not be allowed to obscure what was actually decided in the United States action. The district court resolved conflicting evidence by concluding that the zoning ordinance was *not* enacted for the purpose of excluding blacks from the community (see Pet. 4 & n.1) and, on the basis of a thorough review of the evidence, some of which it cited in its opinion, the court of appeals expressly declined to find purposeful discrimination (*id.* at 4, 5, 17 n.7). By their stipulation (Pet. App. E1-E2) respondents claimed the benefits of the judgment in the United States action, the only action in which the legality of

Black Jack's conduct has been tried, if it was favorable. It was favorable, and they have acted to secure the benefits. They are bound also to accept the limitations of the source of the benefits, one of which is that it posits a statutory, not a constitutional, violation on a finding of unintended discriminatory effect.

2. As they did below, respondents rely upon cases such as *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), for the proposition that federal courts may grant affirmative relief against a municipality for non-intentional violations of the Civil Rights Act. (Br. in Opp. 12-13.) However, as noted in the petition, at pages 13-14, these cases involved discrimination by private parties, and no opinion of this Court deals specifically with the question whether such relief may be had against a municipality. The Court's admonitions concerning the special deference to be accorded to municipalities by federal courts establish at the very least that the result in the municipality's case does not follow ineluctably from the result in the private party's case.

3. Respondents argue here just as baldly as in the court of appeals (Pet. 16) that, when this Court said in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and cases following it (see Pet. 14-17) that a constitutional violation is required before a federal court may grant affirmative injunctive relief against a public entity, it did not mean that but meant to say merely that an injunction may be issued only against someone who has violated or threatens to violate some law. (Br. in Opp. 15-16.) At least one court of appeals has concluded otherwise, despite respondents' unconvincing

effort to explain away the opinion in *Garrett* v. *City of Hamtramck*, 503 F.2d 1236 (6th Cir. 1974) (Pet. 20-21; Br. in Opp. 16). Only this Court can speak authoritatively as to what it meant.

4. At page 12 of their brief in opposition, respondents misstate the issue and the burden of petitioners' argument. Petitioners are clearly not arguing, as respondents would have it, that the federal courts have greater authority to act without specific congressional authorization than with it. Rather, petitioners submit that Congress may not empower a federal court to order affirmative injunctive relief against a municipality in the absence of an intentional, *i.e.*, a constitutional, violation.

While petitioners agree with the brief in opposition that the power of Congress to shape civil rights remedies is "potent," respondents overstate the case when they label such power "plenary." It is not heretical—and it does not "stand[ ] the traditional understanding of the play of federal legislative and judicial authority on its head"—to suggest that Congress may have more power to authorize equitable relief where a state entity has committed a constitutional violation than where it has not.

CONCLUSION

The importance of the question presented is undeniable and scarcely denied by respondents, who demonstrate only that on the merits it can be debated. The question is presented now; the petition is not premature. It should be granted.

Respectfully submitted,

WILLIAM H. ALLEN
ALEX KOZINSKI
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

ROY W. BERGMANN
120 South Central
Clayton, Missouri 63105

SHELDON K. STOCK
130 South Bemiston
Clayton, Missouri 63105

Attorneys for Petitioners

February 1980